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No. 84-897

In The
Supreme Court of the United States
October Term, 1984

FRED TESCH, et al.,

Petitioners,

v.

ROBERT E. McCURRY, et al.,

Respondents.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

A. Eugene Crump
Deputy Attorney General

Harold Mosher
Assistant Attorney General
2115 State Capitol
Lincoln, Nebraska 68509
Telephone (402) 471-2682

Jerry W. Katskee
Milton A. Katskee
430 Plaza of the Americas
7171 Mercy Road
Omaha, Nebraska 68106

Petitioners' Attorneys

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

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EXCUSE MY BROKEN ARM

Very shortly after being served with a copy of the Respondents' Brief in Opposition to the Petition for a Writ of Certiorari, the writer of this brief was in an accident which resulted in one of his arms being broken in five places. He has just returned to work. Hence, this reply brief has not been filed as early as it would have been filed had this writer not suffered a broken arm.

1. Respondents erroneously assert that their § 1983 claim for damages "obviously satisfies" the Article III actual case or controversy requirement for declaratory and injunctive relief. As this court held in *City of Los Angeles v. Lyons,* — U.S. —, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983), a § 1983 claim for damages does not supply the standing necessary for a plaintiff to obtain injunctive and declaratory relief in a federal court.

It should also be observed that Respondents concede at pages 13 and 14 of their Brief that the padlocking of the building occurred only by reason of the issuance of the state court order to close the school. They do not and cannot assert that any padlocking order has been issued since the state district court ordered the padlock removed on October 20, 1982. Moreover, there is nothing in the record to support the allegations regarding the likelihood of future incidents, and no findings regarding such a likelihood were made by the Court of Appeals in support of its declaratory judgment.

Although Respondents feign surprise at the contention that the actual case or controversy prerequisite has not been satisfied, the record clearly reflects that each

Petitioner moved for dismissal of Respondents' complaint on the basis of a lack of jurisdiction over the subject matter (D.R. 26-27 and 73-86).

2. Respondents would have the Court apply the canons of statutory construction to court orders when determining the immunity of law enforcement officers who execute the same. The authorities cited by Respondents for this proposition at page 7 of their Brief are inapposite to the construction of court orders. This contention also begs the question of the meaning of immunity. If a law enforcement officer is, in fact, immune for his actions in implementing a facially valid court order, the rules of construction pertaining to the substantive content of the order are simply not relevant.

The problems inherent in using the rules of statutory construction suggested by Respondents serve to underscore the need for immunity in this context. Requiring the law enforcement officer to apply the canons of construction to each judicial order delivered for execution effectively makes such officer a review authority of every judicial order. Constitutional issues presumably reviewed and determined by the court and embodied in its decision would become subject to scrutiny by the law enforcement officer who can stymie the court's orders by refusing to execute those the officer deems unconstitutional. Who will know the basis for the law enforcement officer's construction of an order and determination of its validity or invalidity, for such determination would presumably be made extra-judicially without the benefit of pleadings, and evidence or the arguments and briefs of counsel?

In our Petition for a Writ of Certiorari, we have discussed the dilemma of the law enforcement officer if not provided with absolute immunity. If the officer in good faith executes an order valid on its face and proper in form, he or she will nonetheless be held answerable in damages under the Eighth Circuit's opinion if the action directed by the court order is subsequently held unconstitutional. On the other hand, if the officer refuses to execute an order valid on its face because the officer believes it to be unconstitutional, the officer risks being held in contempt of court with the attendant civil and criminal sanctions as well as possibly being removed from office. In this situation the officer given a judicial order to execute can only guess, risking criminal and civil sanctions, and hope that the appellate court ultimately sustains his or her position.

Respondents' suggestion that the officer should apply the canons of statutory construction to the judicial order does not resolve this dilemma. First, law enforcement officers should not be placed in the position of having to construe or interpret a judicial order that is clear on its face although possibly raising constitutional questions. Second, requiring the law enforcement officer to interpret the order and implement it in whole or in part in accordance with his or her determination of constitutionality fails to remove the risk of being held in contempt of court and subject to the same criminal and civil sanctions applicable if the officer had entirely refused to implement the order. Judges will likely treat a refusal to execute their orders, whether qualified or unqualified, as a contempt of court.

Contrary to Respondents' position, law enforcement officers should not "rewrite" judicial orders or selectively

enforce the portions of orders they deem to be constitutional. It is fundamental that determinations of constitutionality should be made in the courtroom, not in the sheriff's office.

3. Respondents erroneously assert at page 16 of their Brief that the "fact of the raid . . . [and] the identity and acts of the parties are conceded by both sides." The only aspect of these contentions supported by the record is found in the affidavit of Petitioner Tesch stating that "according to the command [of the state district court order] . . ., on the morning of October 18, 1982, I cleared the church of its occupants, and padlocked the doors securing the building." (Pet. for Cert., App A, 5a; D.R. 66).

There is nothing in the record of this case to support the allegations that *any* of the Petitioners were occupants of the building cleared and padlocked by Sheriff Tesch on October 18, 1982, pursuant to the state district court's order, or that any Respondent conducted a "raid." Thus, there is no support in the record for the declaratory judgment which the Eighth Circuit Court of Appeals directed to be entered in favor of Respondents.

CONCLUSION

The opinion of the Eighth Circuit Court of Appeals in this action represents a radical departure from prior rulings of other circuits and of this Court regarding the principles of absolute immunity and standing as they apply to claims of constitutional deprivation by law enforcement officers and others who implement or execute court

orders. A Writ of Certiorari should issue to review these questions which will have a very significant impact on the future course of judicial administration at both the state and federal level.

Respectfully submitted,

A. Eugene Crump
Deputy Attorney General

Harold Mosher
Assistant Attorney General
2115 State Capitol
Lincoln, Nebraska 68509
Telephone (402) 471-2682

Jerry W. Katskee
Milton A. Katskee
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